SEP 27 1939
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 25

VALVOLINE OIL COMPANY,

Appellant,

vs.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

BRIEF ON BEHALF OF THE VALVOLINE OIL COMPANY.

J. CAMPBELL BRANDON,
Butler, Pennsylvania.
HARRY S. ELKINS,
Munsey Building,
Washington, D. C.
Counsel for Valvoline Oil Company.

INDEX.

Subject Index.

	Page
Opinion of court	1
Jurisdiction	2
Questions	2
Statement	3
The Commission proceedings	5
Proceedings in court below	5, 6
Specifications of errors	6
Statutes involved	7
Summary of argument	7
Argument	9
I. Can the Valvoline be classified as a common carrier?	12
(a) Common carrier defined	13
(b) Transportation incidental to refinery operation	16
(c) Is any "Public Interest" involved?	17
(d) Oil transported is not "In Commerce"	20
(e) Purpose of valuation	23
(f) Valuation provisions of Act not severable	23
II. Are provisions of Act constitutional as applied to Valvoline Oil Company?	26
(a) Application of Act to Valvoline is in violation of due process clause	26
(b) Change of status is confiscatory	27
(c) Status cannot be changed by legislative fiat	28
Conclusion	30

Table of Cases Cited.

Adair v. *United States*, 208 U. S. 161	27
Associated Pipe Lines v. *Railroad Commission of California*, 169 Pac. 62	19, 28
Atlantic Coast Line Ry. v. *Standard Oil Co.*, 12 F. (2d) 541	22

Page

Brink's Express v. *Public Service Commission*, 117 Pa. S. C. 268, 178 Atl. 346 17

Campbell River Mills v. *Chicago, M. & St. Pa. Ry. Co.*, 53 F. (2d) 69, 52 S. Ct. 310 22

Dairymen's Cooperative Assn. v. *Public Service Co.*, 115 Pa. S. C. 100, 318 Pa. 381, 177 Atl. 770 29

Frost v. *R. R. Commission*, 271 U. S. 583, 70 L. Ed. 1101, 46 S. Ct. 605 ..... 20, 29

James v. *Public Service Commission*, 9 P. U. R. (N. S.) 398, 116 Pa. S. C. 577, 177 Atl. 343 17

New State Ice Co. v. *Liebmann*, 52 F. (2d) 349 20

N. Y., N. H. & H. R. Co. v. *I. C. C.*, 55 F. (2d) 1028, 287 U. S. 178, 53 S. Ct. 106, 77 L. Ed. 248 23

Overbrook v. *Public Service Commission*, 100 Pa. S. C. 217 20

Pennsylvania R. R. v. *Pitts., Lisbon & W. Ry. Co.*, 83 F. (2d) 861 21

Pennsylvania R. R. v. *Public Utilities Commission of Ohio*, 298 U. S. 170, 56 S. Ct. 687 21

Pipe Line Cases, 234 U. S. 548, 34 S. Ct. 956, 58 L. Ed. 1459 ..... 9, 14

Producers Pipe Line Co. v. *Martin*, 22 Fed. Supp. 44 19

Producers Transport Co. v. *R. R. Commission of California*, 251 U. S. 228 28

Public Service Commission v. *Grunshaw*, 49 Wuo. 158, 53 P. (2d) 1, 109 A. L. R. 534 17

Railroad Commissioners v. *Montana Grant Petroleum Co.*, P. U. R. Digest, Vol. 3, Sec. 105, page 2727 16

Rampone v. *Leonardini*, 1936 Annual P. U. R. 254, 39 Calif., R. C. R., 588 17

Savage v. *Jones*, 225 U. S. 501, 32 S. Ct. 715, 56 Fed. 1182 22

Smithennan & McDonald, Inc., v. *Mansfield Hardwood Lumber Co.*, 6 F. (2d) 29 29

Standard Oil v. *Hall*, 24 F. (2d) 455 20

State v. *Crochett*, 206 P. 816, 86 Okla. 124 20

State v. *Lyons*, 165 P. 419, 63 Okla. 285 20

State ex rel. Fulton v. *Ives*, 123 Fla. 401, 167 So. 394 29

Page

Tidewater Pipe Line Co. v. *Crawford Co.*, 143 N. E. 87, 311 Illinois 375 15
Tyson Bros. v. *Banton*, 273 U. S. 418 19
Valcour v. *Morrisville* 27 (N. S.) P. U. R. 34, 184 Atl. 881 19
Weisberger v. *Pennsylvania Public Utility Commission*, 7 A. (2d) 731 20
Williams v. *Standard Oil Co.*, 278 U. S. 235, 49 S. Ct. 115 17
Wolff Packing Co. v. *Court of Industrial Relations*, 262 U. S. 522, 43 St. Ct. 630 17
Youngstown & S. R. R. Co. v. *Penna. R. R. Co.*, 1935 P. U. R. 64, 7 P. U. C. 530 22

STATUTES CITED.

Act of June 18, 1910, c. 309, Sec. 1, 36 Stat. 539; March 3, 1911, c. 231, Sec. 209, 36 Stat. 1149; October 22, 1913, c. 32, 38 Stat. 219, U. S. C. A., Title 28, Secs. 45 and 45a 2
Commerce Court Act, Section 7, 36 Stat. 544 14
Hepburn Act of June 29, 1906 (34 Stat. 584) 7, 13
Interstate Commerce Act of February 4, 1887, c. 104, Sec. 1, 24 Stat. 379, as amended by the Hepburn Act of June 29, 1906, c. 3591, Sec. 1, 34 Stat. 584, and Section 400 of the Transportation Act of February 28, 1920, 41 Stat. 474 (49 U. S. C. A. 1) 7
Judicial Code, Sec. 238 as amended by the Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 938, U. S. C. A., Title 28, Sec. 345, par. 4 2
Revenue Act of 1918, Sec. 50(d), 40 Stat. 1103 29
Revenue Act of 1932, Sec. 731(a), 47 Stat. 275 29
Sherman Act, 15 U. S. C. A. 1-7, 15 22
Transportation Act of 1920, Sec. 400 (41 Stat. 374) 7
Urgent Deficiencies Act of October 22, 1913 (c. 32, 38 Stat. 219, U. S. C. A., Title 28, Secs. 45 and 47a) 2

OTHER AUTHORITIES CITED.

American Jurisprudence, Vol. 9, pp. 430-431 19
House Report No. 2192, 72d Congress 9, 25

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 25

VALVOLINE OIL COMPANY,

Appellant,

vs.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

BRIEF ON BEHALF OF THE VALVOLINE OIL COMPANY.

Opinions.

The opinion of the specially constituted District Court for the Western District of Pennsylvania is reported in *Valvoline Oil Company* v. *United States and Interstate Commerce* Commission in 25 F. Suppl. 460 and appears in the record p. 112.

The report of Division One of the Interstate Commerce Commission requiring the submission of data for valuation purposes is reported in 47 Val. Rep. 534 and is printed in the record p. 12. The report of the Commission on Further Hearing is reported in 48 Val. Rep. 10 and is printed in the record p. 23.

Jurisdiction.

The final decree of the specially constituted court (R. 120) was entered December 29, 1938. The petition for appeal was filed (R. 126) February 20, 1939, and an order allowing the appeal was made the same day.

The jurisdiction of this Court is founded upon the following statutes:

Acts of June 18, 1910, C. 309, Sec. 1, 36 Stat 539; March 3, 1911, C. 231, Sec. 209, 36 Stat. 1149; October 22, 1913, C. 32, 38 Stat. 219, U. S. C. A., Title 28, Secs. 45 and 45a.

Section 238 of the Judicial Code as amended by the Act of Feb. 13, 1925 (C. 229, § 1, 43 Stat. 938, U. S. C. A., Title 28, Sec. 345, par. 4).

Urgent Deficiencies Act of October 22, 1913 (C. 32, 38 Stat. 219, U. S. C. A., Title 28, Secs. 45 and 47a).

Questions Involved.

The Bureau of Valuation in 1935 directed the Valvoline Oil Company to file its valuations and certain other data with the Interstate Commerce Commission not later than March 7, 1936 (R. 2). The Valvoline Oil Company never having been required to fulfill any other requirements of a common carrier refused on the grounds that its operation was private and that it did not hold itself out to the public as a common carrier. The appellant was not organized to operate a pipe line and only carries its own oil by pipe line as incidental to the operation of its refineries. The Commis-

sion ruled that under the Hepburn Act and its amendments that it was its duty to require the appellant to submit this data for valuation purposes holding that the Valvoline Oil Company was a common carrier within the terms of the act. In passing on this question the Federal Court restricted its opinion to the one question of filing data requested but did not declare the appellant a common carrier for all purposes. The questions before this Court are:

(A) Whether under the fact the Valvoline Oil Company can be held to be a common carrier.

(B) Whether the Valvoline Oil Company can be compelled to file data for valuation of its properties if it is not a common carrier.

(C) Whether the lower court erred in directing compliance with the Interstate Commerce Commission's order for valuation without determining the Valvoline Oil Company's status.

(D) Whether the decree of the lower court is constitutional.

Statement.

This is a direct appeal from the decree of the United States District Court for Western District of Pennsylvania sitting as a specially constituted three judge court dismissing the petition for an injunction and directing the Valvoline Oil Company to comply with the order of the Interstate Commerce Commission for filing data with the Bureau of Valuation of the Interstate Commerce Commission.

The Valvoline Oil Company is one of the oldest refining companies in this country. It owns and operates refineries at Butler, Pennsylvania, and Warren, Pennsylvania, for the manufacture of high grade lubricating oils and other products from selected Pennsylvania crude oil.

Beginning as a partnership in 1868 in Brooklyn (R. 65) to refine crude oil it continued until 1901 when a New Jersey Charter was granted to the company (Exhibit No. 4, R. 82). Gathering pipe lines were laid prior to 1890 (R. 66) and have been extended to various fields of oil development in Pennsylvania. In 1913 (R. 44) the company extended its lines to Cairo, West Virginia, and in 1926 into Ohio. It now operates in these three States, gathering oil for the Butler refinery, the Warren refinery having been shut down since 1932 (R. 47).

The Valvoline Oil Company's operation is unique. It buys the crude direct from the producer and lays its lines to the producers tanks. The day the oil is run from the producers' tanks it is bought by the Valvoline at the price fixed and quoted by the common carrier pipe lines in that district without any charge for pipeage or transportation. The Valvoline produces no oil and has nothing to do with the price regulations on crude oil (R. 45). In order to have lubricating oil of high quality and color to meet the exacting demands of trade, both domestic and foreign (R. 52), the Valvoline early found it necessary to take only selected crude. Laboratory tests are made for color and various ingredients and oils that fail to meet these requirements are refused (R. 51). This practice has continued for many years and is still in vogue. The importance of having light colored amber crude is well known in refinery circles (R. 53).

The Valvoline has never served the public in any way. It transports only its own oil for use in its refinery. It operates over its own private rights of way without the right of eminent domain. It has no tariffs or carrying charges, nor has it ever had any demand made upon it to transport oil for others. The Valvoline Pipe Lines is a department of the Valvoline Oil Company. The company was incorporated in New Jersey to continue the operation

formerly conducted by the partnership. In the charter it is permitted "to engage in any other manufacturing, mining, construction or transportation business" (R. 83). It was never organized as a pipe line company.

The Valvoline lines are practically all two inch and three inch lines not suited for common carrier purposes, nor does it have storage capacity necessary in the transportation business.

The Valvoline has continued in its private capacity to transport its own oil without any supervision by the Interstate Commerce Commission or any State agency. In 1935 the Director of the Bureau of Valuation, in a letter addressed to the Valvoline, directed it to submit certain data and make valuation returns in accordance with Valuation Order No. 26 Revised effective December 31, 1934, the returns to be filed not later than March 7, 1936 (R. 10). The Valvoline refused to comply with the order and filed its petition with the Interstate Commerce Commission denying the right of the Bureau of Valuation to make such demands or that the Valvoline was subject to the provisions of the Act (R. 10).

After a hearing Division I of the Interstate Commerce Commission filed a report February 2, 1937, 47 Val. Rep. 534 (R. 12), holding the Valvoline to be a common carrier subject to the provisions of the Interstate Commerce Act and that it should comply with Valuation Order No. 26. A petition was filed for rehearing (R. 20) based on changed conditions in operations. After further hearing by the entire Commission a report was filed June 6, 1938 (R. 23, 48 Val. Rep. 10), and the Valvoline was again directed to file its data as required by the order. The Valvoline on August 5, 1938, presented a petition to the United States District Court for Western District of Pennsylvania asking for an injunction to restrain the Interstate Commerce Commission from enforcing its Valuation Order. A hearing

was held before a three judge court specially constituted which was by agreement treated as a final hearing. An opinion by Maris, Circuit Judge (R. 112) filed December 3, 1938, restricting the issue to its narrowest terms, held "that the Valvoline is subject to the provisions of Section 19a of the Interstate Commerce Act authorizing the Commission to value its pipe line property and requiring it to cooperate by furnishing relevant data. That is the only question involved in the case. The case does not involve and we of course do not decide any question as to the extent of the other obligations which may have been imposed upon the Valvoline by the Act." Following this opinion an order was filed January 3, 1939, by the court staying compliance with the decree and valuation order pending final determination of the Appeal to the Supreme Court (R. 124). A petition for appeal to the Supreme Court was filed February 20, 1939, and an order made the same day allowing the appeal (R. 126).

Specification of Errors.

The following errors of the District Court are urged herein:

1. In entering the decree dismissing the petition of the plaintiff for a temporary and permanent injunction for want of equity.

2. In holding that the Valvoline Oil Company is a common carrier engaged in interstate transportation of oil by pipe lines within the meaning of the Interstate Commerce Act to the extent that it is subject to the provisions of Section 19a of the Act.

3. In holding that the order of the Interstate Commerce Commission entered June 6, 1938, directing the Valvoline Oil Company to comply with the provisions of the Com-

mission's Valuation Order No. 26 was within the Commission's statutory powers and was constitutional.

4. In holding that the petition of the Valvoline Oil Company for an injunction enjoining the enforcement of the order should be dismissed.

5. In holding that the Interstate Commerce Commission had any authority or control over the operations of the Valvoline Oil Company.

6. In refusing to find that the Valvoline Oil Company was a purely private corporation not engaged in any interstate commerce in which the public was interested nor was subject to any regulatory provisions of the Interstate Commerce Act.

7. In failing and refusing to give and accord proper legal force and effect to the evidence of record in this case.

Statutes Involved.

This appeal involves an interpretation of the Interstate Commerce Act of February 4, 1887, C. 104 § 1, 24 Stat. 379, as amended by the Hepburn Act of June 29, 1906, C. 3591 § 1, 34 Stat. 584, and Section 400 of the Transportation Act of February 28, 1920, 41 Stat. 474 (49 U. S. C. A. 1).

The pertinent provisions are as follows:

> Sec. 1 (1) That the provisions of this chapter shall apply to common carriers engaged in——
>
> Sec. 1 (1) (B) The transportation of oil or other commodity, except water and except natural or artificial gas, by pipe line, or partly by pipe line and partly by railroad or by water;——
>
> Sec. 1 (3) The term "common carrier" as used in this chapter shall include all pipe line companies; telegraph,

telephone and cable companies operating by wire or wireless; express companies; sleeping car companies; and all persons, natural or artificial, engaged in such transportation as aforesaid or transmission as aforesaid as common carriers for hire——

Sec. 1 (4) It shall be the duty of every common carrier subject to this chapter—to provide and furnish such transportation upon reasonable request therefor and to establish through routes and just and reasonable rates, fares and charges applicable thereto and to provide reasonable facilities for operating through routes——.

Sec. 1 (5) All charges made—shall be just and reasonable—and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful.

Sec. 1 (6) It is made the duty of all common carriers subject to the provisions of this part to establish, observe and enforce just and reasonable classifications of property for transportation—and just and reasonable regulations and practices.——,

Sec. 19a (a) That the Commission shall, as hereinafter provided, investigate, ascertain and report the value of all the property owned or used by every common carrier subject to the provisions of this part——.

Sec. 19a (E) Every common carrier subject to the provisions of this part shall furnish to the Commission or its agents, from time to time and as the Commission may require maps, profiles, contracts, reports of engineers and any other documents, records, and papers; or copies of any or all of the same, in and of such investigation and determination of the value of the property of said common carrier.——

Sec. 19a (i) All final valuations by the Commission and the classification thereof shall be published and

shall be *prima facie* evidence of the value of the property in all proceedings under this chapter——.

The above quotations are from the Interstate Commerce Act as amended by Section 400 of the Transportation Act of 1920 (41 Stat. 474). The portion of the Hepburn Act of June 29, 1906 (34 Stat. 584), Section One which first included pipe line companies reads as follows:

> "That the provisions of this Act shall apply to any corporations or any person or persons engaged in the transportation of oil or other commodity except water and except natural or artificial gas, by means of pipe lines, or partly by pipe lines and partly by water, who shall be considered and held to be common carriers within the meaning and purpose of this Act."

ARGUMENT.

Introductory.

This appeal involves a consideration of the provisions of the Interstate Commerce Act and its amendments dealing particularly with pipe line companies. It brings again before this Court some questions that were considered in the *Pipe Line Cases*, 234 U. S. 548 (reversing in part 204 Fed. Rep. 798), particularly the *Uncle Sam Oil Company* case.

After the decision in the *Pipe Line Cases*, the Interstate Commerce Commission conducted a pipe line investigation and filed a report known as the "Splawn report." House Report No. 2192, 72nd Congress.

This report contains data of its operations furnished by the Valvoline Oil Company but when the order was made requiring certain pipe line companies to file schedules of rates and charges, the Valvoline was not named in the order, although at that time it had extended its lines across the Pennsylvania-West Virginia line (R. 16). It is significant that from that time until the present proceeding no request was made by the Interstate Commerce Com-

mission for data or rates, nor was any effort made to bring the Valvoline under the supervision of the Commission or to show that it was affected by the Hepburn Amendment.

The uncontradicted facts developed in the evidence showing the methods used by the Valvoline in its operation are essential to a proper determination of this case. Summarized they are as follows:

The Valvoline and its predecessors have been refiners of crude oil since 1868. To secure an independent source of supply it has for years gathered oil in pipe lines leading to its refineries. First shipments were made from Pennsylvania about 1890 (R. 66) partly by pipe line and partly by rail to Edgewater, New Jersey. Its lines were extended in 1913 to West Virginia, in 1925 to Ohio (R. 44).

The company selects its grade of crude by laboratory tests (R. 51) and rejects oil offered that does not meet requirements (R. 52) even though it has lines through the leases (R. 46).

The Valvoline lays its lines to the producer's tanks and purchases the oil before it is run into the company's lines. The Valvoline operates only in districts served by large common carriers (Exhibit No. 8) and pays the market price or a premium. There is no written contract to purchase. The producer can change connections from the Valvoline to a common carrier line or vice versa within twenty-four hours. No producer is deprived of an outlet for his product (R. 45).

The Valvoline's lines are laid to transport oil directly to its refineries. It stores no oil except at the refineries and has no storage facilities or tank farms along its lines. It has never run any oil that it did not own. It has never sold any oil run its its lines except a small amount of excess oil occasioned by the temporary shut down of the Warren refinery (R. 42). None of the oil sold is now transported across State lines, though for a short time prior to the first

hearing some oil was gathered in Ohio and sold in West Virginia (R. 20).

The Valvoline gathers its crude oil from about 9020 wells known as "stripper wells" which average 26/100 of a barrel per well per day for a daily run of approximately 2500 barrels. These wells are owned in many small fractional working and royalty interests. The oil carried by the Valvoline is approximately 1% of the total oil run by the common carriers serving the district. The Valvoline operates in a highly competitive field with a constantly diminishing supply of crude oil (R. 48).

The Valvoline has never exercised the right of eminent domain (R. 44). It lays its lines, approximately 1500 miles, on private rights of way (R. 44). It has never transported oil for anyone and no demand or request for transportation service has ever been made upon the company. None of the States in which it operates has undertaken any regulation of its operations or required any permit or franchise (R. 50). No producer is required to sign any agreement or contract for the sale of oil. It is a voluntary arrangement between buyer and seller that can be terminated at any time without notice (R. 45).

If the Valvoline is deemed to be a common carrier it will involve great expense to meet the requirements of the public and the Interstate Commerce Commission (R. 42) and render its own refinery operations much less profitable on account of the various grades and colors of crude oil produced in the different districts. Valvoline's rights to expand, contract and carry on its business as a private refinery enterprise would be impaired and infringed upon if the pipe line department is held to be a common carrier and subjected to all the burdens and restrictions of common carrier operations.

The District Court held that the Valvoline was subject to the provisions of the Act only insofar as it was required

to comply with Section 19a of Valuation Order No. 26 and that the Act was constitutional as applied to the Valvoline's operations. We contend—

I. That:

(A) The Valvoline is and always has been a purely private enterprise;

(B) That the pipe lines are merely a department or arm in the refining business;

(C) That no "public interest" is involved in the operation;

(D) That the oil transported is not "in commerce" or subject to regulations;

(E) That valuation of properties is the basis for rate making and further regulations;

(F) That the valuation provisions of the Interstate Commerce Act are not severable.

II. That:

(A) The Act as applied to the Valvoline is in violation of the Due Process Clause of the 5th Amendment;

(B) That the change of status is confiscatory;

(C) That its status cannot be changed by legislative fiat.

ARGUMENT.

I.

Can the Valvoline Oil Company be Classified as a Common Carrier Within the Term, Subject to the Provisions of the Interstate Commerce Act?

This question we contend must be answered in the negative when the uncontradicted facts concerning the operations, as shown in the testimony, are fully considered.

(a) "Common Carrier" as Defined by the Amendments to the Act.

The Hepburn amendment of June 29, 1906 (34 Stat. 584), to the Interstate Commerce Act, the first to include pipe line companies, reads as follows:

> Section 1. "That the provisions of this act shall apply to any corporation or any person or persons engaged in the transportation of oil or other commodity except natural or artificial gas by means of pipe lines, or partly by pipe lines and partly by railroad, or partly by pipe line and partly by water who shall be considered and held to be common carriers within the meaning and purpose of this act."

The definition of the term "common carrier" in the 1906 Act appears in section one as follows:

> "The term 'common carrier' as used in this act shall include express companies and sleeping car companies. The term 'railroad' as used in this act shall include all bridges and ferries used or operated in connection with any railroad and also all the road in use by any corporation operating a railroad whether owned or operated under a contract agreement or lease and shall also include all switches, spurs, tracks and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, and also all freight depots, yards and grounds used or necessary in the transportation or delivery of any of said property; and the term transportation shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage irrespective of ownership or of any contract, express or implied, for the use thereof and all services in connection with the receipt, delivery, elevation and transfer in transit, ventilation, refrigeration or icing storage and handling of property transported; and it shall be the duty of

every carrier subject to the provisions of this Act to provide and furnish such transportation upon reasonable request therefor and to establish through routes and just and reasonable rates applicable thereto."

No other definition of a common carrier is given in the Act of 1906. The Commerce Court Act, Section 7 (36 Stat. 544), carries the same definition.

Then came the Transportation Act of 1920 which contained a new definition. Section 1 (3) "The term 'common carrier' as used in this chapter shall include all pipe line companies; telegraph, telephone and cable companies operating by wire or wireless; express companies; sleeping car companies; and all persons, natural or artificial, *engaged in such transportation or transmission as aforesaid as common carriers for hire.* (Italics are added.) Wherever the word 'carrier' is used in this chapter it shall be held to mean 'common carrier'."

The Congressional Record shows no reference in the debates on the Act to the amendment to this definition, nor is any explanation given for the addition of the words "as common carriers for hire."

The explanation comes from the fact that between the Act of 1906 and the Act of 1920 the Supreme Court had occasion to construe the pipe line amendment in the *Pipe Line Cases*, 234 U. S. 548, 34 S. Ct. 956, 58 L. Ed. 1459, affirming 204 Fed. Rep. 798 in part and reversing in part. In those cases, particularly the *Uncle Sam Oil Company* case, the court held that the mere fact that a company carried oil across State lines by pipe line did not make it a common carrier. The Uncle Sam Oil Company owned and operated a refinery in Kansas. It also owned and operated certain wells in Oklahoma and transported oil by pipe line across the State line to its refinery. Whether the Uncle Sam Oil Company transported only oil it produced or whether

it also purchased oil is not clear. In 204 Fed. Rep. 798-802 we read: "The extent to which this company purchases oil from other producers, if it engages in that business at all does not appear from the record."

The ownership of the oil was not the determining factor for the large carriers all claimed ownership as well. The court held that the Uncle Sam operation was for a definite use in its own refinery, "the transportation being merely an incident to use at the end." Thus the first time the court construes the pipe line Amendment it holds that a company can transport oil by pipe line across State lines and not become a common carrier within the provisions of the Act.

The Valvoline operation differs in one respect—it produces no oil from its own wells. It purchases its oil from various producers but the transportation is nonetheless incidental to its use in its refineries. Thus is a *bona fide* use established by many years of operation and the ownership is not a mere subterfuge as was found in the other carriers in the *Pipe Line Cases.*

After this decision came the new definition with the qualifying phrase "engaged in such transportation or transmission as aforesaid as common carriers for hire." The words "as aforesaid" refer to the various methods of transportation including pipe lines. The whole history of the pipe line legislation shows that it was to strike at a private monopoly among companies whose primary function was the public transportation by pipe line for profit. The 1920 amendment clarified the definition by excluding private *bona fide* operations that served no public interest. The Valvoline's operations clearly exclude it from the provisions of the act as thus defined.

This line of reasoning was followed in *Tidewater Pipe Line Co.* v. *Crawford Co.*, 143 N. E. 87, 311 Illinois 375 (1924), in which the *Uncle Sam Oil Company* case was cited

with approval. The Tidewater Company sought to be relieved of local taxation on oil in tanks. This oil was purchased in Crawford County, Illinois, and gathered for shipment to the company's plant in Bayonne, New Jersey. The court made no distinction between oil purchased from producers and oil produced from the company's wells and held that the company in this operation was not a common carrier.

In a Montana case, *Railroad Commissioners* v. *Montana Grant Petroleum Co.*, Docket No. 929, Report and Order No. 1435, Dec. 1, 1925, P. U. R. Digest Vol. 3, sec. 105, page 2727, it was held that a corporation producing a small amount of oil and purchasing larger amounts on term contracts does not by transporting such oil through a pipe line to its refinery act as a common carrier if it does not transport oil for hire and has no monopoly of the field.

(b) Transportation by Pipe Line Merely an Incident to Operation of Valvoline Refineries.

The Valvoline early in its history determined that an independent supply of selected crude oil was necessary for successful and profitable operation of its refineries. It therefore undertook the construction of gathering lines, as distinguished from larger trunk lines, for transportation first in Pennsylvania, later in West Virginia and Ohio. These extensions were necessary to secure oil in a diminishing field. Through all the years the Valvoline maintained a strictly private status. It had no right of eminent domain and assumed none. Its lines were laid direct from the producers to its own refineries and were constructed with no thought of carrying oil for any other person. It has neither lines nor storage adequate to handle or deliver oil for other producers and to make such changes would involve enormous expense. There are large common carriers owning refineries to which they deliver their own oil, but it must be borne in mind that they are primarily carriers and the

refineries are an adjunct to their transportation systems. The acid test of a company's status is its method of conducting its business over a period of years. The Valvoline's operations meet this test.

Rampone v. *Leonardini* (1936), 1936 Annual P. U. R. 254, 39 Calif., R. C. R. 588;

Public Service Commission v. *Grunshaw*, 49 Wyo. 158, 53 P. (2nd) 1, 109 A. L. R. 534;

James v. *Public Service Commission* (1935), 9 P. U. R. (N. S.) 398, 116 Pa. S. C. 577, 177 Atl. 343;

Brink's Express v. *Public Service Commission*, 117 Pa. S. C. 268, 178 Atl. 346.

(c) Is There Any "Public Interest" Involved in Valvoline's Operations?

The Commission in its report (R. 18) states, "We find that there is a public interest served in the movement of the commodity carried by it."

Practically every private business serves some public interest but this term "public interest" as used in the Commission's report must be limited to the meaning given it in judicial decisions. This term is used almost exclusively in the classification of business known as public utilities. "It means that a business or property in order to be affected with a public interest must be such or be so employed as to justify the conclusion that it has been devoted to a public use and its use thereby in effect granted to the public." *Williams* v. *Standard Oil Co.*, 278 U. S. 235-239-240, 49 S. Ct. 115.

In *Wolff Packing Co.* v. *Court of Industrial Relations*, 262 U. S. 522, 43 S. Ct. 630, Chief Justice Taft speaking for the court subdivides business clothed with a public interest justifying public regulation into three classes; "(1) Those carried on under the authority of a public grant or privileges expressly or impliedly imposing an affirmative duty of ren-

dering public service demanded by the public such as common carriers and public utilities. (2) Occupations regarded as exceptional, the public interest attaching to which has been recognized from earliest times and has survived the period of arbitrary laws by Parliament or colonial legislatures for regulating trades and callings. In this class are inns, cabs and grist mills. (3) Businesses which, though not public at their inception, have become such by devoting their business to a public use, thereby granting the public an interest in that use and subjecting themselves to public regulations to the extent of that interest, although the property continues to belong to its private owner and to be entitled to protection accordingly."

The reasoning by the Commission is largely based on the fact that the Valvoline gathers oil from 9020 (Exhibit # 10, R. 92) stripper wells scattered over Western Pennsylvania, West Virginia and a small part of Ohio, owned by less than 500 producers or groups (R. 25). That these wells are so small that common carriers cannot afford to construct, maintain and operate lines for transportation of oil in such small quantities. Thus instead of benefitting the producers by having the Valvoline declared a common carrier it would have the opposite effect and tend to destroy the outlet for their oil if the Valvoline had to operate under common carrier regulations. Far from being a monopoly compelling producers to sell their oil, the Valvoline, not fettered by the burdens of common carrier regulations, is able by economical operation to furnish them access to market at prices at least equal to the prices posted by common carriers. Even these operations are in some instances not profitable (R. 64).

The record is void of any fact or circumstance that would indicate public interest in the Valvoline's operation. General welfare does not furnish a sufficient basis for every regulation to which a business might be subjected; nor does the fact that the operation is large and covers considerable terri-

tory give it any element of public interest. *Tyson Bros.* v. *Banton*, 273 U. S. 418-430.

In the territory served by the Valvoline (Exhibit # 15, Map) the six common carriers transported 79,512.084 barrels of crude and in the same year the Valvoline ran 890,885 barrels. Where a company transports only a relatively small part of the total production of the field and carries on its business in a private manner it is not a common carrier. *Associated Pipe Lines* v. *Railroad Commission of California*, L. R. A. (N. S.) 1918 C. 849, 169 Pa. 62.

American Jurisprudence Vol. 9, pp. 430-431, cited with approval in 112 A. L. R. 86-90 annotation, states: "The distinctive characteristic of a common carrier is that he undertakes to carry for all people indifferently and hence he is regarded, in some respects, as a public servant. The dominant and controlling factor in determining the status of one as a common carrier is his public profession or holding out by words or by a course of conduct as to the service offered or performed."

> "The important thing in determining if a corporation is a public utility is what it does, not what its charter says."
>
> *Valcour* v. *Morrisville* (Vermont) 27 (New Series) P. U. R. 34-39, 184 Atl. 881.

It was held in *Producers Pipe Line Co.* v. *Martin*, 22 Fed. Sup. 44 (Kentucky), that the public has no right to the use of a pipe line and the owner cannot be compelled to allow any person producing oil to use it where it acquired none of its rights by condemnation, does not hold itself out as a common carrier and uses it only to transport its own oil acquired from many producers.

> "We understand 'public interest' to mean more than mere curiosity. It means something in which the public, the community at large, has some pecuniary interest

or some interest by which their legal rights or liabilities are affected. It does not mean anything so narrow as the interests of the particular localities which may be affected by the matters in question."

State v. *Lyons*, 165 P. 419, 63 Okla. 285; also *State* v. *Crochett*, 206 P. 816, 86 Okla. 124, *New State Ice Co.* v. *Liebmann*, 52 F. (2nd) 349, *Standard Oil* v. *Hall*, 24 F. (2nd) 455, *Overbrook* v. *Public Service Commission*, 100 Pa. S. C. 217.

In a recent case decided by the Superior Court of Pennsylvania, *Weisberger* v. *Pennsylvania Public Utility Commission*, reported in advance sheet 7 A. (2nd) 731, Weisberger operated a dairy and hauled milk purchased from various producers to his dairy and charged the cost of transportation against the price paid for the milk. It was held that the purchaser was his own carrier, the transportation being necessary for the conduct of his own dairy business and was not a common or contract carrier under the statute, citing the *Uncle Sam Oil Company* case as well as *Frost* v. *R. R. Commission*, 271 U. S. 583 and others.

(d) The Oil Transported by the Valvoline is Not "In Commerce."

The Valvoline requires selected crude for its refinery graded according to color and refining qualities (R. 52). This oil is bought direct from the producer and flows from his tanks to the Valvoline's lines. It is not mixed or commingled with any other oil. Only one grade of oil is transported through these lines. All lines are laid from the producing fields to the refineries. No oil is stored except at the plant which is limited to a ten-day supply. Constant pumping of crude through the lines is essential to the operation of the refinery. This transportation becomes a vital part of the refinery operation. Crude oil is the raw product which is carried to the refinery for manufacture into lubricating

oils, petrolatum and other products. This oil is not "in commerce" until the refining is complete and the products ready for market.

In *Pennsylvania R. R. v. Public Utilities Commission of Ohio*, 298 U. S. 170, 56 S. Ct. 687, the Pittsburgh Coal Company transported coal in its own barges down the river and then carried it by rail over private tracks from Pennsylvania to Ohio to its plant to be washed and graded for market, "making use of its own facilities, its trains and tugs and barges." This Court sustained the Coal Company's contention that the coal transported by rail across State lines was not "in commerce" until it left the plant where it is prepared for market and was therefore not subject to the regulations of Interstate Commerce. The late Justice Cardozo, speaking for the court, said:

> "Not all commerce is transportation and not all transportation is by common carrier by rail. The question for us here is not whether the movement of the coal is to be classified as commerce or even as commerce between the States. The question is whether it is that particular form of interstate commerce which Congress has subjected to regulation in respect of rates by a Federal Trade Commission. The Interstate Commerce Act (49 U. S. C. A. # 1 *et seq.*) is aimed at common carriers exclusively #1 (1) (3) and not even at all these."
>
> In determining the application of the Act, "transportation begins for that purpose, if not for others, when the merchandise has been placed in the possession of a carrier—And wherever the word carrier is used in this chapter it shall be held to mean 'common carrier' —. *The transportation between Pennsylvania and Ohio was by the owner who was not a common carrier but furnished implements of carriage for its own use exclusively.*" (Italics are added.)
>
> Also *Pennsylvania R. R.* v. *Pitts. Lisbon & W. Ry. Co.*, 83 F. (2d) 861-865.

In *Campbell River Mills* v. *Chicago M. & St. P. Ry. Co.*, 53 F. (2d) 69, 52 S. Ct. 310, affirming 42 F. (2d) 775, 285 U. S. 536, 76 L. Ed. 930, logs were hauled over a private logging railroad from British Columbia across the border to U. S. and delivered to defendant railroad for shipment. The logs were not "in commerce" until committd to the railroad for shipment. Commerce is a practical legal conception drawn from the course of business, *Savage* v. *Jones*, 225 U. S. 501, 32 S. Ct. 715, 56 Fed. 1182. There is a difference between interstate commerce and interstate transportation. One is governed by the nature of the business; the other by the nature of the particular transportation. "Commerce" is within inhibitions of the Sherman Act, 15 U. S. C. A. § 1-7, 15, but "transportation" may have no relation to interstate rates on shipment of the same goods within the same State. *Atlantic Coast Line Ry.* v. *Standard Oil Co.*, 12 F. (2d) 541-547, *Youngstown & S. R. R. Co.* v. *Penna. R. R. Co.*, 1935 P. U. R. 64, 7 P. U. C. 530-537.

It is true that the Valvoline sells a very small amount of its oil in crude state. Due to economic conditions the Warren refinery has been shut down since 1932. From 1934 to 1937 a small amount of crude, 3.78% of the total monthly run, was transported from Ohio to West Virginia. A small part of this oil was sold to the refinery at St. Marys, West Virginia (R. 54). This arrangement was a temporary one to dispose of excess crude. None of the crude oil sold has crossed state lines since 1937 (R. 54). It was sold to two small refineries close to the Valvoline lines as an accommodation to the Valvoline and at its request (R. 64). The amount of excess oil is diminishing and will soon adjust itself. This sale of excess oil as a temporary measure does not change the status of the company, *Valcour* v. *Morrisville, supra.*

(e) Purpose of Requirement Under the Act for Valuation of Properties.

Under Sec. 19a (a) of the Act the Commission was directed to value the properties belonging to or used by common carriers. The purpose of this provision for valuation is to have adequate data to determine the justness of the rates charged by the carriers. The order for Valuation No. 26 served on the Valvoline is the first step in compelling it as a common carrier to submit data, establish traffics and rates, and in general to comply with all regulations affecting common carriers. It was argued by government counsel that this Valuation Order was no hardship on the Valvoline and could be easily complied with. In the first place, it would be very difficult for the Valvoline to furnish the necessary data. Its lines were laid over a period of fifty years without any definite plan in mind (R. 69). No adequate records were kept of location of lines, rights of way and other data (R. 70), and it would require a large amount of work to satisfy the Interstate Commerce Commission.

In the second place it definitely fixes the status of the Valvoline as a common carrier, for the primary use of valuations under the Act is for rate making purposes.

N. Y., N. H. & H. R. Co. v. *I. C. C.*, 55 F. (2d) 1028-1034, 287 U. S. 178-200, 53 S. Ct. 106, 77 L. Ed. 248; and the Act makes the valuation mandatory for all common carriers with a few minor exceptions that have no application here.

(f) Valuation—The Provisions of the Act are not Severable.

This case was submitted to the District Court on the record before the Interstate Commerce Commission. No additional testimony was taken. The Valvoline questioned the authority of the Interstate Commerce Commission to compel it to comply with Valuation Order No. 26. In de-

ciding this case the District Court undertook to sever the provisions of the Act and restrict the decision to compliance with the Valuation Order. The Court said: "We therefore decide that the Valvoline is subject to the provisions of Section 19a of the Interstate Commerce Act authorizing the Commission to value its pipe line property and requiring it to cooperate by furnishing relevant data. That is the only question involved in the case. The case does not involve, and we of course do not decide, any question as to the extent of the other obligations which may have been imposed upon the Valvoline by the Act" (R. 119). The court must have given heed to this statement in the brief of defendant, "The Commission's order under attack requires nothing more of the petitioner than the furnishing of certain information." These honeyed words are only sugar coating for the bitter pill. The decision requiring data for valuation is based on the finding of the Commission that the Valvoline is a common carrier. The District Court now limits its decision thus (R. 119-120):

> "The Valvoline Oil Company is a common carrier engaged in the interstate transportation of oil by pipe line within the meaning of the Interstate Commerce Act *to the extent* that it is subject to the provisions of Section 19a of the Act." (Italics are added.)

Does the court undertake to create a new class of common carriers subject only to certain provisions of the act or does this statement show that the District Court could not go the whole way and declare the Valvoline a common carrier in all respects? The Valvoline has no reason to refuse to supply any information it has or that it can reasonably secure for the Commission, nor does it complain of the order to avoid taxation because it now pays the tax levied on oil transported by pipe line (R. 50). The Valvoline's complaint is that classed as a common carrier it is

forced to supply this data and that it will be subject to all other regulations of the Commission applicable to common carriers in general. The three judge court with its own knowledge of the oil business and its operations in the Pennsylvania field refused to say that the Valvoline was a common carrier for all purposes under the Act. We contend the court fell in error in trying to sever the provisions of the Act. If the facts developed in the testimony do not warrant the finding that the Valvoline is a common carrier for all purposes, then it was the court's duty to restrain the Interstate Commerce Commission from issuing any order based on such a finding.

The Interstate Commerce Commission seemed also to entertain some doubt as to the application of this Act to the Valvoline. After concluding that the Act intended to convert all interstate pipe lines to common carriers without regard to their previous status the report says (R. 15):

> "Whether Congress could lawfully so act is not for us to decide. The Interstate Commerce Commission is an administrative body which may not presume to annul by interpretation an act of the federal legislature. As the result of our investigation certain pipe line companies, parties to the proceeding, were ordered to file schedules of rates and charges for the interstate transportation of oil in compliance with the provisions of the Act. *The Valvoline was not named in our order although its lines at that time extended across the Pennsylvania West Virginia State line.*" (Italics are added.)

The investigation referred to was summarized in a "Report on Pipe Lines," House Report No. 2192, 72nd Congress, prepared by Mr. Walter M. W. Splawn.

The failure to include the Valvoline in the list of common carriers is strong indication that at that time the Interstate Commerce Commission concluded, after investigation, that the Valvoline was not a common carrier. There are no

facts or circumstances regarding the company's operations in the intervening years to change the situation. It is interesting to note that during the hearing before the Interstate Commerce Commission Mr. Eastman asked counsel for the Commission what benefit was to be had from the valuation of the Valvoline as it was now paying the pipe line tax. Counsel responded that there was no apparent benefit to be derived but that the act was mandatory. Why, then, should we strain the construction of the act to bring the Valvoline within its provisions without benefit to the public and to the great detriment of the company, forcing it into the common carrier class.

II.

Are These Provisions of the Interstate Commerce Act as Applied to the Valvoline in Violation of the Constitution?

(a) Interstate Operations of Valvoline Before Hepburn Amendment.

Stress has been laid on the fact that Valvoline did not lay any pipe lines across state lines until 1913 (R. 44). This is true but it is also true that Valvoline has been engaged in interstate transportation for over fifty years. These shipments came under the classification in the amendment of shipments "partly by pipe line and partly by rail." The Valvoline's first pipe lines were laid near Warren, Pennsylvania, about 1890 or before (R. 66). A large part of this oil was piped to a loading rack at Tiona, Pennsylvania, and shipped from there by rail to the company's refinery at Edgewater, New Jersey (R. 66). This method of interstate shipments was well established and in operation long before the Hepburn amendment of 1906.

(b) Confiscation of Property by Change of Status.

To change the private status of the Valvoline to that of a common carrier under the Act will involve expenses of operation and equipment estimated from $200,000 to $300,000 (R. 42). This does not include the additional cost of any increase in lines or storage if other oils not up to Valvoline specifications, known as "pipe line crude" are carried for the public (R. 43). To meet the demands of a public carrier requires a complete change not only in the equipment for pumping oil through the lines but also the erection of storage tanks and a rearrangement of the method of handling crude at the refineries. Thus the conversion of a private operation to public use becomes a taking without "Due Process." *Adair* v. *U. S.*, 208 U. S. 161.

The recent proposed legislation for the divorcement of pipe lines from refineries (Senate Bill No. 2009 on which the Senate Interstate Commerce Committee held hearings, and the Borah Gillette Bill S. 2181 introduced April 17, 1939) serves as an illustration of what may be expected if the Valvoline is held to be a common carrier. A separation of the Valvoline's pipe lines from the refinery operation would render the pipe lines unprofitable and practically valueless. Like the Hepburn amendment aimed at monopolistic operations of the large carriers, this new legislation is aimed to cure some similar evils. The Valvoline's operation is so small it is almost negligible. It has no means or method to compel any producer to deal with it. Any reason for divorcement of large carriers and refineries is entirely lacking in the Valvoline operation, yet such legislation might apply to it if the Valvoline is determined to be a common carrier for all purposes.

(c) The Status of the Valvoline Cannot be Made by Legislative Fiat.

We have undertaken to show that the Valvoline's operation was interstate before the Hepburn amendment of 1906. Thus a purely private interstate pipe line operation would by legislative fiat be stripped of its private character and declared to be a common carrier. With the resultant expense to operate as a common carrier and the damage sustained it becomes an appropriation of private property without compensation and without due process of law.

In the *Pipe Line Cases, supra*, Chief Justice White in a concurring opinion stated that there was no power under the Constitution without the exercise of the right of eminent domain to convert a private business into a public one without the company's consent.

In *Producers Transport Co.* v. *R. R. Commission of California*, 251 U. S. 228, affirming 176 Calif. 499, Mr. Justice Van Devanter said:

> "It is of course true that if the pipe line was constructed solely to carry oil for particular producers under strictly private contracts and never was devoted by its owner to public use, that is to carrying for the public, the state could not, by mere legislative fiat or by any regulating order of a commission convert it into a public utility or make its owner a common carrier; for that would be taking private property for public use without just compensation which no state can do consistently with the 'due process of law clause' of the 14th Amendment."

In another California case, *Associated Pipe Line Co.* v. *Railroad Commission*, L. R. A., U. S. 1918C 849, 169 Pac. 62, the statute was held in violation of the due process clause of the 14th Amendment where it undertook to convert a private pipe line into a common carrier. The company in-

question had never exercised the right of eminent domain nor transported oil for hire. It was held that the use by the owner determined its status and that to declare such a company a common carrier was to deprive it of its rights and to dedicate it to public use without due compensation.

A private carrier cannot by mere legislative command be converted against its will into a common carrier. *Frost* v. *R. R. Commission*, 47 A. L. R. 457, 271 U. S. 583, 70 L. Ed. 1101, 46 S. Ct. 605; *Dairymen's Cooperative Assn.* v. *Public Service Co.*, 115 Pa. S. C. 100-112, 318 Pa. 381, 177 Atl. 770; *State Ex. Rel. Fulton* v. *Ives*, 123 Florida 401, 167 Southern 394.

In *Smithennan & McDonald Inc.* v. *Mansfield Hardwood Lumber Co.*, 6 F. (2d) 29, construing an Arkansas statute the court said:

> "The latter (the statute) of course is limited to common carriers and does not extend to transportation for the sole purpose of conducting material to and from its own mill."

Here we have a company that embarked long ago in a purely private business and has never changed its policy. Its investments were made long before pipe lines became the subject of interstate commerce regulation. As proof that the Valvoline does not deny the governments exercise of lawful authority over pipe lines it should be noted that the Valvoline pays a tax (R. 50) imposed upon "all transportation of crude petroleum and liquid products thereof by pipe line". Revenue Act of 1932, Sec. 731(a), 47 Stat. 275, and the prior Revenue Act of 1918, Sec. 50(d), 40 Stat. 1103, upon all transportation of oil by pipe line.

The Act further provides (A-2)—"In case no charge for transportation is made either by reason of ownership of the commodity transported or for any other reason, a tax equivalent to 4 per centum of the fair charge for such trans-

portation, to be paid by the person furnishing the transportation;" (B-2). "If no such rates or tariffs exist then at the basis of actual *bona fide* rates or tariffs of other pipe lines for like service". These sweeping provisions affect private carriers and common carriers alike.

Conclusion.

The issue here is clearly defined. The order of the Commission and its authority to make the order are based upon the finding that the Valvoline is a common carrier. While such a finding presumably might not at present interfere with the company's operation it cannot be predicted, as shown by the pending legislation on divorcement of pipe lines, in what manner or how seriously the Valvoline may be involved. The Valvoline's operation has not in all the years of operation transgressed any rights of others nor has there ever been any complaint about its operations. These facts only sustain our contention that its purchase and piping of oil is a private transaction between buyer and seller in which the public has no interest.

We, therefore, respectfully submit that this finding of the Commission and the District Court should be set aside and a permanent injunction granted.

HARRY S. ELKINS,
J. CAMPBELL BRANDON,
Attorneys for Valvoline Oil Company, Appellant.